Pembenaan Keng Ting (Sabah) Sdn Bhd v Seloga Jaya Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-22-526-91
EE CHIN SENG JC
19 JANUARY 1994

Arbitration *— Referring dispute to arbitration — Provision in sub-contract requiring disputes, differences and questions arising between parties to be referred to arbitration — Defendant terminated contract — Plaintiffs issued writ against defendant claiming damages for wrongful termination — Application by defendant for an order for stay of proceedings in accordance with arbitration agreement — Discretion of court to grant stay — Principles on which court's discretion should be exercised — Arbitration Act 1952 s 6*

Arbitration *— Referring dispute to arbitration — Meaning of 'step in the proceedings' — Whether resisting an injunction a 'step in the proceedings' — Arbitration Act 1952 s 6*

Arbitration *— Referring dispute to arbitration — Whether applicant 'ready and willing to do all things necessary to the proper conduct of the arbitration' — Arbitration Act 1952 s 6*

The defendant ('Seloga') was appointed by the Ministry of Defence to carry out the construction of certain works. Seloga appointed the plaintiff as sub-contractors to manage and complete the overall construction of the project for Seloga, in accordance with the provisions of the main contract which contained an arbitration clause as did the sub-contract. Sums of money certified and paid to Seloga under the main contract were paid into a specific joint account, out of which 95% of the amounts certified under two certificates issued under the main contract were paid by Seloga to the plaintiff. A sum of RM1,416,000 certified under the main contract was paid into that account by Seloga on 14 November 1991 and withdrawn by them on 16 November 1991. Disputes arose between Seloga and the plaintiff and, on 13 November 1991, Seloga determined the plaintiff's employment under the sub-contract. The validity of the determination was disputed by the plaintiff who, on 21 November 1991, obtained an ex parte interim injunction restraining Seloga from preventing the plaintiff from entering the site. This injunction was discharged by consent of both parties on 2 January 1992. The plaintiffs issued a writ against Seloga claiming, inter alia, damages for wrongful termination. Seloga applied for the proceedings to be stayed under the provisions of s 6 of the Arbitration Act 1952 ('the Act'). The senior assistant registrar ('the SAR') refused the stay, without giving reasons. Seloga has appealed.

Held, refusing the application for a stay of proceedings:

(1) Although the SAR had given no grounds for his refusal of the stay, and such decision was not binding on the court, it deserved the court's consideration and acceptance if his exercise of discretion

A was correct and based on judicious and judicial principle. In the present case, there was no evidence to warrant a total disregard of his decision.

(2) Although the court is inclined to give effect to an arbitration agreement in a contract between the parties, in the present case, the SAR exercised proper and judicious discretion based on settled principles of law to refuse a stay because it was for Seloga to satisfy the court that they were ready and willing to do all things necessary to the proper conduct of the arbitration before a stay could be granted. This constitutes the necessary condition precedent. An oath merely affirming that an applicant for a stay is 'ready and willing to do all things necessary for the arbitration' is insufficient. Therefore, as the termination appeared to have been done with dubious intent, it was for the trial judge to determine whether the termination of the sub-contract was right or wrongful in subsequent breach of contract proceedings.

(3) The filing of an affidavit opposing the interim injunction granted ex parte and a preliminary objection taken as to the court's jurisdiction to grant the injunction is definitely a 'step taken in the proceedings' by Seloga.

(4) As Seloga's attempt to set aside the injunction was unsuccessful, it was too late and not bona fide for Seloga to resort to s 6 of the Act.

[Bahasa Malaysia summary

Defendan ('Seloga') telah dilantik oleh Kementerian Pertahanan untuk melaksanakan kerja-kerja pembinaan yang tertentu. Seloga telah melantik plaintif sebagai subkontraktor untuk mengurus dan menyempurnakan keseluruhan kontrak pembinaan itu bagi pihak Seloga, menurut peruntukan kontrak utama yang mengandungi suatu fasal timbangtara sebagaimana yang terdapat di dalam subkontrak itu. Jumlah wang tertentu yang telah disahkan dan dibayar kepada Seloga di bawah kontrak utama itu telah dibayar ke dalam suatu akaun bersama yang spesifik, di mana 95% daripada jumlah yang telah ditetapkan di bawah dua sijil yang telah dikeluarkan di bawah kontrak utama itu telah dibayar oleh Seloga kepada plaintif. Sejumlah sebanyak RM1,416,000 yang telah disahkan di bawah kontrak utama itu telah dibayar ke dalam akaun itu oleh Seloga pada 14 November 1991 dan telah dikeluarkan oleh mereka pada 16 November 1991. Pertikaian telah timbul di antara Seloga dan plaintif dan, pada 13 November 1991, Seloga telah menamatkan perkhidmatan plaintif di bawah subkontrak itu. Keesahan penamatan subkontrak itu telah dipertikaikan oleh plaintif dan, pada 21 November 1991, mereka telah mendapat suatu injunksi interim ex parte untuk menyekat Seloga daripada menghalang plaintif daripada memasuki tapak pembinaan tersebut. Injunksi ini telah ditamatkan dengan persetujuan kedua-dua pihak pada 2 Januari 1992. Plaintif telah mengeluarkan suatu writ terhadap Seloga dengan menuntut, antara lain, ganti rugi untuk penamatan

salah. Seloga telah memohon untuk menggantung prosiding itu di bawah peruntukan s 6 Akta Timbangtara 1952 ('Akta itu'). Penolong kanan pendaftar ('PKP itu') menolak permohonan untuk penggantungan itu, tanpa memberi sebarang alasan. Seloga telah membuat rayuan.

Diputuskan, menolak permohonan untuk menggantung prosiding itu:

(1) Walaupun PKP itu tidak memberi sebarang alasan apabila beliau menolak permohonan untuk menggantung prosiding itu, dan keputusannya tidak mengikat mahkamah ini, ia berhak diberi pertimbangan dan diterima oleh mahkamah jika penggunaan budi bicara PKP itu adalah secara betul dan berdasarkan prinsip yang bijak dan prinsip kehakiman. Di dalam kes ini, tidak terdapat keterangan yang mewajarkan supaya keputusan beliau tidak diendahkan sepenuhnya.

(2) Walaupun mahkamah sedia melaksanakan suatu perjanjian timbangtara di antara kedua-dua pihak, di dalam kes ini, PKP itu telah menggunakan budi bicaranya mengikut prinsip yang bijak dan prinsip kehakiman berdasarkan prinsip undang-undang yang mantap apabila beliau enggan menggantung prosiding itu kerana terpulanglah kepada Seloga untuk memuaskan mahkamah bahawa mereka bersedia dan sanggup membuat segala yang perlu supaya timbangtara itu dapat dijalankan dengan betul sebelum penggantungan prosiding boleh diarahkan. Ini merupakan syarat terdahulu. Suatu sumpah yang hanya mengesahkan bahawa seseorang pemohon untuk penggantungan prosiding 'bersedia dan sanggup melakukan semua perkara yang perlu bagi perjalanan wajar timbangtara itu' adalah tidak mencukupi. Oleh itu, memandangkan bahawa penamatan subkontrak itu nampaknya telah dibuat dengan niat yang diragui, adalah untuk hakim perbicaraan untuk memutuskan sama ada penamatan subkontrak itu adalah betul atau salah di dalam prosiding kemungkiran kontrak yang kemudiannya.

(3) Afidavit yang telah difailkan untuk menentang injunksi interim yang telah diberi ex parte dan suatu bantahan awal yang telah dibuat mengenai bidangkuasa mahkamah untuk memberi suatu injunksi adalah jelas merupakan suatu 'langkah yang diambil di dalam prosiding itu' oleh Seloga.

(4) Oleh kerana percubaan Seloga untuk mengetepikan injunksi itu tidak berjaya, adalah terlalu lewat dan tidak bona fide bagi Seloga menggunakan s 6 Akta itu.]

Notes

For cases on arbitration agreements, see 1 *Mallal's Digest* (4th Ed) paras 542–559.

For cases on stay of proceedings pending an arbitration, see 1 *Mallal's Digest* (4th Ed) paras 626–637.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–542–1992.]

Cases referred to

1 *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 (refd)
2 *Forest Development Sdn Bhd v Syarikat Permodalan dan Perusahaan Pahang Bhd* [1981] 2 MLJ 285 (refd)
3 *Heyman v Darwins Ltd* [1942] AC 356 (refd)
4 *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225 (not follld)
5 *Adams v Catley* (1892) 66 LT 687 (refd)
6 *Dooley v The London Assurance* (1872) ILTR 22 (follld)
7 *Wong Lok Khiam v Dato' Peter Lo Su Yin & Ors* [1972] 1 MLJ 176 (refd)
8 *D & C Finance Bhd v The Overseas Assurance Corp Ltd* [1989] 3 MLJ 240 (not follld)
9 *Subal Chandra v Mohd Ibrahim* AIR 1943 C 484 (refd)
10 *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646 (refd)
11 *Kiu May Construction Co Ltd v Wai Cheong Co Ltd* (1985) 29 BLR 137(refd)
12 *Scott v Avery* (1856) 5 HLC 811; 10 ER Rep 1121 (refd)

Legislation referred to

Arbitration Act 1952 s 6

G Sri Ram (*Philip Choong* with him) (*Philip Choong & Co*) for the plaintiff.

Vinayak Pradhan (*Chee Yok Yung* with him) (*Sheikh Shatar Cheah Tan & Lee*) for the defendant.

Ee Chin Seng JC: The defendant, Seloga Jaya Sdn Bhd, was appointed by the Ministry of Defence to carry out the development of a project known as Kerja Pembinaan Awam in Kubong, Labuan. By a contract in writing dated 17 January 1991, the defendant appointed the plaintiff as a sub-contractor to manage and complete the overall construction of the said project in accordance with the stipulated provisions and conditions as set out in the main contract.

According to the contention of the plaintiffs, pursuant to the terms of the said agreement, they have carried out construction works on the said project and delivered materials on site. For that, three interim certificates for payment duly certified by the consultant engineers were issued by the Ministry of Defence for payment. The defendant had paid the plaintiff 95% of the amounts certified under Interim Certificate Nos 1 and 2. A cheque for the sum of RM1,416,000 in respect of the amount certified under Interim Certificate No 3 dated 28 October 1991 was collected by the defendant from the Ministry of Defence on 14 November 1991. The said cheque was paid into the specific joint account by the defendant on 14 November 1991 and withdrawn on 16 November 1991.

Following that, the defendant, purportedly by a letter dated 13 November 1991, determined the plaintiff's engagement under the said sub-contract and all rights and benefits conferred on the plaintiff and a valuation of the work done and materials delivered to the site by the plaintiff would be carried out. The plaintiff has, in their statement of claim and in the affidavits in support of its application for injunction, averred that the termination was wrongful and vexatious, null and void which constitutes a breach of contract by the defendant.

The plaintiff had, on 21 November 1991, obtained an ex parte interim injunction order restraining the defendant from prohibiting the plaintiff from entering the project site. However, on 2 January 1992, the ex parte injunction order dated 21 November 1991 by consent of both parties was discharged on terms as agreed between them.

There was an application for a stay of proceedings of the writ of summons filed by the defendant. This was dismissed by the learned senior assistant registrar ('the SAR') on 27 March 1992. Following that dismissal order, the defendant filed an appeal to the judge-in-chambers which was both heard and dismissed by me on 4 November 1992. This dismissal order by me is now the subject matter of an appeal to the Supreme Court. Hence, this ground of judgment concerns that appeal.

This is an appeal by the defendant before the judge-in-chambers against the decision of the learned SAR for dismissing their application for the stay of these proceedings on the ground that there is an arbitration clause in the contract between the plaintiff and the defendant requiring disputes, differences and questions arising between them to be referred to arbitration. This referral is made pursuant to s 6 of the Arbitration Act 1952 ('the Act') which confers on the court the power to stay proceedings where there is submission to arbitration.

Section 6 reads as follows:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make the order staying the proceedings.

Defendant's standpoint as to why the matter should be referred to arbitration instead of litigation in court

The defendant's position is that if there is a valid arbitration clause as in this case and the defendant is ready and willing to do everything necessary to commence arbitration for a stay of proceedings, the court will refer to arbitration. The arbitration clause must be given effect to and the onus shifts to the plaintiff to show why the matter should not be referred to arbitration. The defendant's affidavit avers that the agreement contains an

arbitration clause and also illustrates the differences, disputes and questions arising between the plaintiff and the defendant within the scope of the arbitration clause. The defendant claims to state that he is willing and ready to do all things necessary for the arbitration. The defendant also, before taking any other steps in the proceedings, has applied to court for a stay of these proceedings. The defendant has therefore satisfied or complied with the requirements of s 6 of the Act.

Authorities cited by the defence which are relevant to arbitration clauses

(1) *Perbadanan Kemajuan Negeri Perak v Asean Paper Security Paper Mill Sdn Bhd*[1]

In the above-cited case, the defence claims that the first part of the arbitration clause is very similar to the one in our present case. The defence contends further that even if the applicant's case is a weak one as perceived by the court, it is no ground to refuse the application to refer the matter to arbitration.

The defendant complained of the severe delay in the completion of the contract work based on the dissatisfaction shown by the Government of Malaysia. This alleged delay was attributed more to the defendant. Such was the basis for the termination of the employment. The plaintiff claims that such termination was wrongful and claims damages which are not quantified. Such disputes are covered under the said arbitration clause including any damages arising out of the breach of contract. In support of that view, the defence relies on the case decided by VC George J in *Forest Development Sdn Bhd v Syarikat Permodalan Perusahaan Pahang Bhd.*[2]

(2) *Forest Development Sdn Bhd v Syarikat Permodalan Perusahaan Pahang Bhd*[2]

The learned judge, in the above-cited case, held that the act of purporting to terminate the contract raised the dispute which is the scope of the arbitration clause. However, the defence does not accept the view of the plaintiff that the act of termination is an act of repudiation of the contract. The defence relies on an English Court of Appeal case of *Heyman v Darwins Ltd.*[3]

(3) *Heyman v Darwins Ltd*[3] (at p 356 per Viscount Simon LC)

A question of law which arises from disputes is not a ground for refusing the stay of proceedings.

(4) (a) *The Law and Practice of Commercial Arbitration in England* (2nd Ed) by Mustill and Boyd.
(b) *Russell on the Law of Arbitration* (20th Ed) by Walton and Victoria.

In another aspect, the defendant disclaims the plaintiff's contention that they (ie the defendant) by entering a conditional appearance to oppose the plaintiff's application for an order of injunction are measures considered steps taken in the proceedings and thus waiving the arbitration clause. Such contention has no meritorious support. The learned authors of a book

entitled *The Law and Practice of Commercial Arbitration in England* (2nd Ed) by Mustill and Boyd say that resisting an application for an 'interlocutory injunction by putting in evidence and appearing in court is not a step'. A

In the book entitled *Russell on the Law of Arbitration* (20th Ed) by Walton and Victoria, the learned authors express the view that filing affidavits and contesting proceedings for an interlocutory injunction is not considered a 'step in the proceedings'. It further adds that 'the statute contemplates some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists of asking for an interlocutory injunction. So long as one makes an application for stay of the proceedings before taking any other steps in the proceedings the right of stay of the proceedings is preserved'. B C

(5) *Roussel-Uclaf v GD Searle & Co Ltd*[4]

Using the principle in the cited case above, s 6 of the Act has been complied with by the defendant and there is no question of waiver of the arbitration clause in the agreement. This is particularly so as long as the defendant does not take any offensive steps or actions which the defendant is entitled to participate in all interlocutory proceedings in court provided they have made an application for stay of the proceedings in court. This is to prevent the plaintiff from avoiding the arbitration clause simply by taking out any application which would prejudice the defendant if they do not respond. D E

Respondent/plaintiff's contention

(1) To grant or to refuse a stay of proceedings is within the ambit of the court's discretion; and
(2) before the burden shifts to the plaintiff to show why the matter should not go to arbitration, it is for the defendant first to prove or establish that at the time when the proceedings were commenced he was ready to proceed to arbitration. F

The principle enunciated in the cited case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill*[1] is that it is for the defendant to show that he was at the time of the commencement of the proceedings ready and willing to arbitrate over the dispute. In addition, he must by affidavit show that he is still ready and willing to do so. The applicant/defendant wishing to go to arbitration must satisfy both the conditions to earn an order of stay. Any one of the conditions not being satisfied then such application for stay of proceedings should be dismissed. Merely affirming that he is ready and willing is not enough but he must show evidence that he is so. This is stated in the said Supreme Court case of *Asean Security Paper Mill*[1] and Mustill and Boyd's book. Of course, the plaintiff can show that the defendant has no intention to proceed to arbitration, ie the intention was not manifested. Evidence of such negative intention was seen through the affidavit of the plaintiff dated 14 April 1992, ie the letter dated 13 November 1991, ie eight days before the issue of the writ of summons. This letter mentions the termination under a specific clause in the contract agreement but expresses G H I

no desire and readiness to go to arbitration. Thus, under such circumstances, the burden on the defendant has not been discharged.

The phrase 'ready and willing' is found at p 473 at para (d)(i) of Mustill and Boyd's book on *Commercial Arbitration* (2nd Ed). It states that:

> The applicant must show that he is ready and willing to do all things necessary to the proper conduct of the arbitration. This requirement relates both to the time when the proceedings were commenced and to the time when the court is called on to exercise its discretion. Evidence that the applicant is ready and willing must be furnished by affidavit.

The above statement draws support from an old case of *Adams v Catley*.[5] Basically the underlining principle is that a stay will not be granted if the applicant has taken steps in the proceedings. The applicant must unequivocally elect to have the dispute decided by arbitration.

Two other cases cited by the respondent/plaintiff concerning the reference to arbitration on disputes between parties are:

(1) *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd*[1]
(2) *Dooley v The London Assurance*.[6]

In these two cases cited above, the courts recognized that the arbitration proceeding pursuant to the arbitration clause could be used as an engine of delay. On the issue of delay, the Supreme Court in the *Asean Security Paper* case[1] makes an apt concluding observation at the end of the judgment in which it reiterates:

> ... contractual provisions for arbitration can sometimes be abused ... surely it is not the intention of s 6 of the Act to confer on a defendant the privilege of delaying proceeding to enable him to put off the day of judgment indefinitely. It should be the duty of everyone involved to see that the matter be expeditiously resolved.

Evidence of readiness and willingness *ante litem mortem* is absent here in this case. It was one of the conditions precedent recognized by the Supreme Court in the *Asean Security Paper Mill* case.[1] A writ in that case was issued on 21 November 1991 and the earliest correspondence was a letter exhibited in the affidavit of Quah Chong Peng dated 14 April 1992. The letter was dated 12 November 1991, nine days before the issue of the writ. At that time the appellant and the respondent were enjoying the benefit of legal advice. The letter from Messrs KC Lim, solicitor for the respondent, shows that there was already a dispute between the parties at that time. A day later, ie 13 November 1991, the applicant wrote to the respondent terminating the employment. From this it reveals that the appellant was already prepared to go for litigation. Nowhere was it stated that they were ready and willing to arbitrate on the matter of dispute. Thus it can be seen that one of the conditions under s 6 of the Act has not been satisfied. Therefore, the learned SAR was correct in exercising the discretion against the appellant when the application for stay of proceedings was refused.

Salient aspects of the facts of this case as viewed by respondent/plaintiff strengthen the contention that order for stay of proceedings pending reference

to arbitration under s 6 of the Act was properly and correctly refused. They are: A

(a) Both sides have had the benefit of legal advice.
(b) All contemporaneous correspondence do not reveal a desire or intention to arbitrate or even referring to arbitration.
(c) At this stage of the O 14 action, the appellant is delaying the action by relying on the arbitration clause. There was no bona fide intention and if there was, it should have been shown long ago. B
(d) Steps taken in the proceedings:
In this case, the appellant did not merely file an affidavit to oppose the injunction before another judge, Anuar J, but also appeared at that hearing in which a preliminary objection was raised by them as to its jurisdiction which was dismissed. In short there was an attempt to set aside the injunction on a preliminary point. This is considered 'a step taken in the proceedings' and not merely defending a blow. This proposition can be found in the case of *Wong Lok Khiam v Dato Peter Lo Su Yin & Ors.*[7] C D

Gist of replies by counsel for the defendant

(1) The court is to exercise discretion on legal principles whether to grant an order of stay of proceedings under s 6 of the Act.
(2) Although it is an appeal to the judge-in-chambers against the decision of the learned SAR, it is treated as if it comes before the court for the first time. E
(3) This court is bound by the decision of the Supreme Court in the case of *Asean Security Paper.*[1]
(4) Counsel admits that weight must be given to the decision of the SAR but could only do so based on reasoned judgment. Since no written judgment was given by SAR, no weight should be attached. F
(5) The condition precedent of 'ready and willing' to go to arbitration in accordance with s 6 of the Act has been shown in para 6 of encl 6. It is for the plaintiff to show otherwise. In this respect, the case of *D & C Finance Bhd v The Overseas Assurance Corp Ltd*[8] held that the plaintiff must give reasons or evidence to show that the defendant was not ready and willing to refer the dispute to arbitration. Merely denying is not sufficient. G
(6) The defence considers the word 'claim' used in the letter of p 167 of encl 24 cannot be taken to mean the statement of claim. There must be a claim instituted against the defendant before the defendant invokes the arbitration clause. Confronted with this 'claim' for the first time was when defendant was first served with the writ. H
(7) The defence quotes Paruck's *Arbitration Act* at p 509: 'Mere inaction prior to the commencement of the legal proceedings cannot be construed as want of readiness and willingness to go to arbitration' and states that there was silence on the part of the defendant but it did not preclude them from raising an arbitration clause. I
(8) The defence alleges that the plaintiff's action in rushing to court has the effect of an attempt to deprive the defendant of their rights of arbitration.

A However, learned counsel Encik Sri Ram distinguished the facts of the *Asean Security Paper* case[1] from our present case in that there was no dispute in the cited case whereas there exists one in our present case. There is no question on the part of the plaintiff rushing to court but to obtain an order of injunction which the arbitration has no power to give.

B (9) Participation in the injunction proceeding is not a waiver and more so when an application for stay had already been filed by the defendant.

Note: Learned counsel, Encik Sri Ram, rebutted the above principle in Paruck's *Arbitration Act* which was cited from an Indian High Court whereas C the policy of Malaysian courts is a preference of UK cases over Indian cases. Hence, *Dooley*'s case[6] should prevail over the Calcutta case of *Subal Chandra v Mohd Ibrahim*.[9]

Grounds for dismissal of appeal against the decision of the SAR

D (1) This appeal arises from the decision of the learned SAR who refused the application for stay of proceedings pending the reference of dispute between parties to arbitration pursuant to s 6 of the Act. Though it comes in the form of an appeal it does take the shape and style of a re-hearing before the judge-in-chambers. Whatever it is, due weight should E be given to the decision of the learned SAR who had exercised his or her discretion in refusing the order of stay. Such a view can be found in the cited cases of *Evans v Bartlam*[10] and *Kiu May Construction Co Ltd v Wai Cheong Co Ltd.*[11] This is to say in my view, though such decision of the SAR is definitely not binding on this court, it deserves this F court's consideration and acceptance if such exercise of discretion is correct based on judicious and judicial principle. There is no evidence to show otherwise in our present case to warrant a total disregard of that decision.

(2) The defendant/appellant's application for stay of proceedings pending G reference to the arbitration is under s 6 of the Act.

Settled principles of law on the invocation and use of the arbitration clause

Primarily, the case of *Scott v Avery*[12] has set down a well-settled principle of law that parties cannot by contract oust the jurisdiction of the courts but H parties may by contract covenant that no right of action shall accrue until a third person, eg the arbitrator, has decided on any difference which arises between the parties.

It is thus logical to say that when parties have agreed to refer disputes for arbitration and the court is satisfied that a dispute exists, but one of the I parties to the contract convenes an action to have the matter determined by the court, the prima facie position of the court is to stay the proceedings and allow the parties to proceed to the tribunal to which they both have agreed in their contract. In short the court is inclined to give effect to the wishes of parties in the arbitration clause, ie referral to the arbitration tribunal.

Enunciated principles in the Supreme Court case of Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd[1] *with regard to the arbitration clause under s 6 of the Act*

In the above case it was held, inter alia:

(1) The words in s 6 of the Act, namely, 'in respect of any matter agreed to be referred to arbitration', 'if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement', and that the applicant was at the time when the proceedings were commenced and 'still remains ready and willing too all things necessary to the proper conduct of the arbitration' constitute the necessary conditions before an order of stay is granted.

(2) In an application pursuant to s 6 of the Act the court had a discretion whether or not to grant stay. The language of s 6 of the Act is such that if the party opposing the application for stay can show sufficient reason why the matter should not go to arbitration, the court should not normally grant stay.

In the light of the above-enunciated principles, I am of the considered view that the learned SAR had exercised proper and judicious discretion based on the settled principle of laws to refuse the stay of proceedings in the High Court, Kuala Lumpur to refer the dispute to the arbitration tribunal for determination. My basis for saying so are as follows:

(i) The defendants, in order to qualify for going to arbitration to resolve disputes between parties under s 6 of the Act, must satisfy the court that they are ready and willing to do all things necessary to the proper conduct of the arbitration before an order of stay is granted. This constitutes the necessary condition precedent.

The exchanges of correspondence between the parties in this case show the intention and conduct of parties. The writ was issued on 21 November 1991 and there was correspondence on 12 November 1991, ie nine days before the issue of the writ. That was the letter of default and the respondent's solicitor's letter of Messrs KC Li reveals that there was already a dispute in existence between them. A day after that, ie 13 November 1991, the applicant/defendant wrote to the respondent terminating the employment. From this letter onwards, ie the notice of termination, it has been shown that the defendant/appellant was already prepared to go for litigation. Therefore, up to this point the burden has not yet shifted to the plaintiff to show why matters should not go to arbitration simply because the defendant/applicant has failed to establish that at the time of the commencement of the proceedings they were 'ready and willing' to proceed to arbitration. Mere affirming on oath that they are 'ready and willing to do all things necessary for the arbitration' is not sufficient.

(ii) Nowhere, at the time of the commencement of proceedings in court, has the defendant/appellant indicated that it is 'ready and willing' to arbitrate on the matter or dispute. There is no reference at all in the contemporaneous correspondence for a desire or even intention on the

part of the defendant/appellant to refer dispute to arbitration bearing in mind both sides have the full advantage of legal advice. Therefore, one of the conditions precedent as envisaged in s 6 of the Act and discussed in the *Asean Security Paper* case[1] has not been satisfactorily shown.

(iii) In accordance with the term of the agreement so far, the defendant had paid to the plaintiff/respondent 95% of the amounts in certified Interim Certificates Nos 1 and 2 but for certified Interim Certificate No 3 dated 28 October 1991, amounting to RM1,416,000 for which a cheque was collected from the Ministry of Defence, the employer, on 14 November 1991 by the defendant, this was not done. This sum was credited into the joint account but withdrawn on 16 November 1991. Thus the need to terminate the employment of the defendant on 14 November 1991, the day of collection of the third certified interim payment is put in grave doubt as it appears to have the dubious intention of depriving the plaintiff of their rightful share of the portion of this said sum of money for work which had been satisfactorily done and approved. It is for the trial judge to determine whether the termination was right or wrongful at a subsequent breach of contract proceeding.

(iv) Steps taken in the proceedings

It is not correct for the defence to say that appearance in the injunction proceedings and resisting is just a defence to ward off the blow by the plaintiff. In the injunction proceedings heard before Anuar J, not only did the defendant file an affidavit opposing it but also raised a preliminary objection as to the court's jurisdiction which was subsequently dismissed and failed to set aside the order of injunction. This is definitely a 'step taken in the proceedings' by the defendant.

After the unsuccessful attempt before the learned judge Anuar J, to set aside the injunction, the defendant now resorted to the provisions of s 6 of the Act with a view to stay the proceedings. It is too late in the day to do so and not bona fide in intention. Obviously the defendant wants to have two bites of the cherry. Steps in the proceedings have already been taken by them.

In view of the above, I dismiss the defendant/appellant's appeal against the SAR's decision in refusing the order of stay of the proceedings.

Appeal dismissed.

Reported by Prof Vincent Powell-Smith